88-969

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH LOMBARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JEROME FELDMAN
29 East Madison Street
Chicago, Illinois 60602
(312) 726-5190
Attorney for Petitioner

JUDITH A. HALPRIN
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether merger of a conspiracy count sentence with multiple consecutive sentences for aiding and abetting substantive count sentences that are supported only by evidence of conspiratorial membership, creates an illegal sentence that is abusive of sentencing discretion and violative of rights secured by the Due Process Clause of the Fifth Amendment to the Constitution (or, if merger of sentences is required upon an identity of proof, must the merger be of the aiding and abetting sentences with that of the conspiracy sentence instead of the reverse?).

PARTIES TO PROCEEDINGS BELOW

In the proceedings below, *United States v. Lombardo, et al.*, No. 88-1268 (8th Cir. 1988), United States of America was appellee, and Joseph Lombardo, Angelo LaPietra and John Cerone were appellants. Lombardo is petitioner herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH LOMBARDO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Joseph Lombardo prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, denying his appeal from the denial of his Rule 35 (Federal Rules of Criminal Procedure) Motion to Reduce Sentence by the trial court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, consolidated Nos. 88-1268 to 88-1270, filed October 21, 1988, is not yet reported and is set out

as Appendix A. The judgment of the United States District Court, filed February 2, 1988, is set out as Appendix B.

JURISDICTIONAL STATEMENT

On October 21, 1988, the Court of Appeals for the Eighth Circuit filed its opinion (App. A). There was no petition for rehearing filed. This petition is timely filed within 60 days thereof. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and court rule 20.1.

Jurisdiction was lodged in the trial court under 18 U.S.C. §3231, giving jurisdiction for offenses against the United States, the charges against petitioner being such offenses.

STATUTES (RULES) INVOLVED

Rule 35(b), Federal Rules of Criminal Procedure

> Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of an order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Chang-

ing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction under this subdivision.

STATEMENT OF THE CASE

Petitioner Joseph Lombardo and others were indicted under 18 U.S.C. §§1952 and 371. All were charged as principals in a conspiracy at count 1. In counts 2-8 petitioner was charged as an aider and abettor of named principals (all co-conspirators) with the use of interstate facilities for the purpose of unlawfully engaging in a gambling enterprise in violation of Nevada laws.

Following conviction petitioner appealed and, while affirming the convictions, the Eighth Circuit Court of Appeals recommended that the trial court reconsider imposition of consecutive sentences on counts 2-8 in view of the fact that the only evidence of petitioner's guilt of counts 2-8 was his membership in the count 1 conspiracy (830 F.2d 938, 946 n.8).

Petitioner brought a Rule 35 Motion for Reduction of Sentence, premised upon the concerns of the Eighth Circuit Court of Appeals. The trial court, while largely denying relief, nevertheless expressed deference to the concern of the Court of Appeals and revised the sentences so that the sentence upon count 1 is now merged with the sentence imposed upon count 2, and all others remained intact (App. 7-8).

REASONS FOR GRANTING THE WRIT

THE DOCTRINE OF MERGER OF SENTENCES IMPOSED UPON CONVICTION OF MULTIPLE OFFENSES PREMISED UPON PROOF OF A SINGLE ACT REQUIRES MERGER OF THE SUBSTANTIVE COUNT SENTENCES WITH THAT OF THE CONSPIRACY COUNT, PRECLUDING A REVERSAL SO AS TO MERGE THE CONSPIRACY SENTENCE WITH THOSE OF THE SUBSTANTIVE COUNTS.

Petitioner was charged with conspiracy (count 1) and seven separate Travel Act violations (counts 2-8). He was charged only as an aider and abettor of named principals in each of counts 2-8. Counts 2-8 are identical to specific overt acts charged in count 1, *i.e.*, count 2 = overt act 74, count 3 = overt act 27, count 4 = overt act 32, count 5 = overt act 33, count 6 = overt act 34, count 7 = overt act 38, and count 8 = overt act 39. None of these overt acts charges any conduct by petitioner.

Despite the specific charge of counts 2-8, the government adduced no evidence against petitioner of his aiding and abetting any principal named in any offense charged. After the close of the proofs, the government secured an instruction, purportedly under the theory of *Pinkerton v. United States*, 328 U.S. 640 (1946), that instructed if it was determined that petitioner was a member of the conspiracy (guilty of count 1), he could be convicted of counts 2-8 upon a theory of vicarious liability for the proven acts of the named principals who were his count 1 co-conspirators.

At appeal petitioner's argument that *Pinkerton* was misemployed (its ruling specifically excluding applicability of

its vicarious liability theory with regard to aiding and abetting charges [328 U.S. at 646, n.4]), and resulted in a violation of his constitutional protection against double jeopardy was rejected (830 F.2d 938, 8th Cir. 1987). Nonetheless, the Eighth Circuit found that the evidence supporting his convictions of counts 2-8 was identical to that supporting his conviction of count 1 (indeed, so was the charge) (*Id.* at 946 n.8).

The result of the instructions given, and their approval in the Eighth Circuit Court of Appeals, is that where there is an absence of any proof of aiding and abetting another, but proof of conspiratorial membership, *Pinkerton*, as employed here, comes to stand for the proposition that a conspirator is *per se* an aider and abettor of his co-conspirator, and as such is subject to myriad substantive charges requiring no proof beyond that of conspiratorial membership.

While declining to affirmatively rule, the Eighth Circuit expressed concern about the consecutive multiple sentences imposed in this circumstance, and recommended that the trial court reconsider them at Rule 35 proceedings.

At Rule 35 proceedings, the trial court acknowledged the Eighth Circuit's concern (App. 7-8), and refashioned petitioner's sentences. In so doing, it created contradictory and impermissible results. It accepted the rectitude of the precept of the required merger of sentences here, but then merged them in reverse order to that which was compelled by the doctrine. In direct contradiction of the stated concern of the Eighth Circuit, the trial court merged the conspiracy count sentence with one of the *Pinkerton*-count sentences (count 2), leaving all remaining multiple consecutive sentences intact. Thus, the trial court, admitting merger was required, merged in reverse, abusing

its discretion and creating an illegal sentence violative of petitioner's due process rights.

On appeal of this order, the Eighth Circuit noted that the trial court's action was the exact opposite of that which it had urged (App. 3), but concluded that even that conduct was within the trial court's broad grant of discretion at sentencing.

Petitioner respectfully contends that the Eighth Circuit was in error, and that the trial court's revision of his sentence in fact transgressed the parameters of its admittedly sweeping discretionary powers. Petitioner contends that, having acceded to the Eighth Circuit's opinion that the merger of sentence was dictated here, given the precise identity of the charges and evidence, along with the state of the record reflecting that the only evidence adduced as to petitioner related to count 1, then the merger of sentences was required to follow the charges and the evidence so that the *Pinkerton*-count sentences had to be merged with the conspiracy-count sentence, and not the other way around.

At the heart of the Eighth Circuit's concern was the fact that petitioner was charged as a principal in count 1 and as an aider and abettor in counts 2-8, and there being no evidence of his aiding and abetting anyone, his convictions of counts 2-8 were premised exclusively upon evidence of his conspiratorial membership under submission of a *Pinkerton* instruction providing a vicarious liability theory of guilt. In short, under this theory of prosecution and instruction, petitioner became an aider and abettor of himself.

Clearly, if intending to heed the Eighth Circuit at all, the trial court was compelled to make the *Pinkerton*-count

sentences concurrent or merged with the conspiracy count sentence, it being the only one supported by the charge and the evidence adduced.

Instead, in a logic-defying order (at which the Eighth Circuit expressed its bewilderment [App. 3]), while paying the homage of lip service to its superior tribunal, the trial court revised its sentences so as to make the conspiracy-count sentence concurrent with one of the *Pinkerton*-count sentences, leaving all other multiple consecutive sentences that troubled the Eighth Circuit intact.

The trial court's revision resulted in imposition of an illegal sentence, abusive of its discretionary power and violative of petitioner's due process rights. The court's new sentence stands for the proposition that an identity of charges and proofs (requiring merger at sentencing) can now be employed to impose the harshest available sentence for the offenses *not* proven through merger of the sentence imposed for the only offense proven with that of the offenses not proven by any evidence except commission of the one offense affording the lesser maximum punishment.

In short, there having been no aiding and abetting proof established, and only conspiratorial membership proven in support of the aiding and abetting liability charged (itself a legal oxymoron under *Pinkerton*), petitioner was then sentenced in a fashion that admits the identity of the proof but rearranges the counts in which that proof was established so as to permit merger of sentence of the proven offense with the harsher sentence imposed upon the otherwise unproven offenses.

The result here is that petitioner was proven to be a member of a conspiracy. He was not proven to have aided

and abetted any offense charged in counts 2-8. To the extent that his conspiratorial membership alone operated to convict him of aiding and abetting the offenses charged in counts 2-8, it is precisely the same conduct charged and proven at count 1, but not the other way around. Yet at sentencing the count 1 conspiracy membership is punished nine times in separate, consecutive sentences.

The Eighth Circuit's rejection of petitioner's original complaint of double jeopardy was premised largely upon the ruling of *United States v. Ianelli*, 420 U.S. 770, 773 n.5, 95 S.Ct. 1284, 1288 n.5, 43 L.Ed.2d 616 (1975) that, agreement being the essential element of conspiracy while aiding and abetting logically implies but does not require proof of agreement, that difference served to distinguish one from the other, defeating claims of merger.

Here though, *Ianelli* is inapplicable for the fact remains that the *only* proof of aiding and abetting that the government offered against petitioner was his inferred agreement as to each of counts 2-8, that inference to be drawn from his inferred seminal agreement to join the conspiracy which contemplated, as its overt acts, the very acts charged in these substantive counts.

Once the rectitude of merger of sentences in this circumstance is acknowledged by the trial court, the merger must follow the legal precepts upon which the notion is premised and by which it is guided in its application. In resentencing here the trial court was required to look past the narrow ruling of *Ianelli* for guidance. Resentencing here must be premised upon the rulings of *Whalen v. United States*, 445 U.S. 684, 53 L.Ed.2d 715 (1980) and *Illinois v. Vitale*, 447 U.S. 410, 421, 65 L.Ed.2d 228, 238 (1980).

Under the guidance of those rulings the Sixth Circuit Court of Appeals, in *Pandelli v. United States*, 635 F.2d 533 (1980), found itself instructed by this Court's modification of the traditional elements-of-the-statute analysis of *Blockburger v. United States*, 284 U.S. 299 (1932), and premised its analysis upon review of the requisite statutory elements from the particular perspective of the actual case before the court. (635 F.2d at 536). *Pandelli* looked to "the legal theory of the case, or the elements of the specific criminal cause of action for which the defendant was convicted . . ." (*Id.* at 538).

When examined in accord with the standards enunciated in *Whalen* and *Vitale*, particularly in view of the trial court's implicit acknowledgement of the requirement of merger of sentences here, the illegality of the refashioned sentence imposed emerges most clear. Here, unlike in many conspiracy cases in which substantive offenses are prosecuted and punished as separate crimes which indeed involve distinct conduct, the fact is that *this* conspiracy offense and *these* aiding and abetting offenses charged are by definition one and the same. That identity results purely from the election of the government to charge specified overt acts and particular substantive offenses, and to then premise its proof of guilt of the aiding and abetting offenses exclusively upon guilt of conspiratorial membership accompanied by submission of a *Pinkerton* instruction.

It was precisely this theretofore unique trial circumstance that troubled the Eighth Circuit upon appeal and resulted in its recommendation of merger of sentences. It was troubling because that which had been so neatly joined at trial (single proof of inchoate conduct as proof of multiple specified acts) was then nicely severed at sentencing, permitting sentences for each separate offense to be imposed, when conviction of them had relied exclu-

sively upon an identical charge, repeated nine times and supported but once and that, strictly limited to conspiratorial membership. The prohibition of this result has been routinely recognized by various courts of review. *United States v. Forrester*, 836 F.2d 856, 861 (5th Cir. 1988), ruling that where the charges are identical to those contained in the conspiracy allegation, they can be made separately, and separate convictions upon each of them can be sustained, but they cannot give rise to imposition of multiple sentences. (Accord, *Brown v. Ohio*, 432 U.S. 162, 53 L.Ed.2d 187 [1977]; *United States v. Kirk*, 723 F.2d 1379, 1381 [8th Cir. 1983]; *United States v. Grubbs*, 828 F.2d 18, 19 [8th Cir. 1987]).

Pandelli's ruling, in response to those of *Whalen* and *Vitale*, was, we suggest, the inevitable evolution of the *Blockburger* analysis, arising in response to the need of greater protection against abuse that evolved in the proliferation of charges available under ever increasing legislation that gave rise to the prosecutor's unbridled ability to charge nearly limitless numbers of offenses out of single transactions. *Whalen* and its progency like *Pandelli* spoke directly to that concern expressed ten years earlier in *Ashe v. Swenson*, 397 U.S. 436, 445 n.10, 25 L.Ed.2d 469, n.10, stating that accompanying the extraordinary proliferation of overlapping and related statutory offenses, it has become possible for prosecutors to "spin out a startingly numerous series of offenses from a single alleged transaction . . ." giving rise to a new and threatening potential for unfairness and prosecutorial abuse. It is precisely that abuse in which the prosecutor indulged here, and in which the trial court, contrary to the clear expression of disapproval of its superior tribunal, indulged yet again in a cynical pretense of acceptance of the merger doctrine while acting so as to stand the underlying principle and policy on its head.

In contrast to the action of the appellate court here, the Sixth Circuit Court of Appeals intervened directly to rectify the abuse predicted in *Ashe* and occurring here. In *United States v. Austin*, 529 F.2d 559, 564 (1976), the Court ruled improper the imposition of consecutive sentences imposed for a bribery conspiracy and the related substantive act of bribery because proof of all of the offenses depended upon the same evidence. The *Austin* Court spoke pointedly, vacating the more severe sentence imposed "to avoid any incentive for the government to seek similar multiple punishments in the future." (529 F.2d 559, 564 n.6).

To our knowledge, the original trial of this case marked the first attempt by the government in criminal cases charging conspiracy and aiding and abetting of each conspirator by all the others in the substantive counts where it lacked any evidence of personal conduct with regard to the offenses charged in those counts. It was the first time of which we are aware that the government charged aiding and abetting, failed to adduce any evidence of aiding and abetting, and then at the instruction juncture of the case for the first time submitted its prosecutorial theory that it was proceeding under a perversion of the *Pinkerton* doctrine so as to create vicarious liability as a premise for conviction of aiding and abetting. In so doing, the government didn't merely fail to inform petitioner of the true nature of the charge against which he was required to defend. In fact, it deliberately misinformed him of the nature of the charges against him until after the close of proofs. Subsequent cases have proceeded upon an identical approach upon the declination of the Eighth Circuit Court of Appeals to prohibit its employment.

Despite its affirmance of the process, in view of its expressed dissatisfaction with the sentencing result, the trial court agreed, albeit reluctantly, that merger at sentenc-

ing was appropriate. That merger, under the *Whalen* and *Vitale* standards, cannot be accomplished as it was in the court's resentencing absent violence to petitioner's rights secured by the Due Process Clause.

When the trial court was persuaded to sentence petitioner anew, he was before its bench in possession of rights secured to him by the Due Process Clause of the Fifth Amendment to the Constitution. Its requirement of fundamental fairness still acts to define even broad grants of judicial discretion. Fundamental fairness is not determined merely by measuring a sentence imposed against the maximum statutory sentences available in a multiple count indictment, and upon determination that they do not exceed that maximum, the conclusion is compelled that no abuse of discretion could have occurred. Fundamental fairness is not so precisely susceptible to mere addition and multiplication.

Here, the issue is not whether the number of years imposed is careful not to exceed the possible number available. Here rather, the issue is, when persuaded by a superior tribunal that the very imposition of consecutive multiple sentences supported exclusively by evidence of guilt of but one of them, can the court, consistent with the guarantee of fundamental fairness rooted in the Due Process Clause, grudgingly elect to merge the sentences, and then do so in such a way as to merge the only proof-supported sentence with the longer available pyramided sentences imposed for convictions, the only evidence of which is found in the merged sentence.

This Court has defined the guarantee of fundamental fairness in *Jackson v. Denno*, 378 U.S. 368, 378 n.8 as follows:

> ". . . [t]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded

> in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just."

The deliberate reverse-merger by the trial court of consecutive sentences when confronted with appellate disapproval of imposition of such sentences does not comport with the clear and simple language defining fundamental fairness in *Jackson*. Nor does it comport with the principle of judicial avoidance of creative activism of the bench in order to achieve more than Congress intended in its legislation. In viewing this aspect of petitioner's claim it is important to remember that the *Pinkerton* doctrine, upon which the multiple consecutive sentences here are exclusively premised, does not arise from any legislation. It bespeaks no Congressional intent. It is purely judge-made law. To uphold the action of the trial court in this instance it is necessary to hold that not only did Congress intend, by specific legislation, to permit cumulative punishments for substantive offenses actually committed, but that, while never so stating, it inferentially intends also to permit cumulative punishments for offenses not actually committed, but reached only through distorted *Pinkerton* vicarious liability. The actions of Congress with regard to the judicially created *Pinkerton* doctrine appear to preclude that presumption.

Prior to *Pinkerton*, 18 U.S.C. §550 provided that "Whoever . . . aids, abets, . . . [etc.] *is* a principal." The legislation had wholly abrogated the common law distinctions between principals and aiders and abettors or accessories. After *Pinkerton*, which relied upon the wording of §550, the Congress repealed that provision, enacting the current 18 U.S.C. §2 which restores the distinction between principal and aider and abettor. To the extent that Con-

gress has spoken at all then, with regard to *Pinkerton*, it acted to preserve rather than merge the distinction.

Similarly, Congress has enacted conspiracy legislation and has, over the years, declined to increase the punishment available for the offense. The indictment and the evidence of this case prove no more than conspiratorial membership by petitioner. The indictment merely finds numerous ways in which to describe that one act, and so to charge it again and again. While the authorities cited herein clearly permit it to be charged repeatedly and vicariously, and permit conviction upon each way in which it is charged, they do not permit that one act to be punished repeatedly and consecutively. The single act can still be punished but once, and only for the maximum term provided by Congress for such an act. The overreaching of the trial court here, in acknowledging the necessity of merger and then merging in reverse, violates the principle of judicial restraint as well as petitioner's Due Process rights to fundamental fairness before the bar of justice.

CONCLUSION

For the foregoing reasons petitioner Joseph Lombardo urges the court to issue its writ of certiorari to the end that the opinion of the court below be reversed.

Respectfully submitted,

JEROME FELDMAN

Attorney for Petitioner

JUDITH A. HALPRIN
Of Counsel

APPENDICES

APPENDIX A

[Filed October 21, 1988]

United States Court of Appeals
For the Eighth Circuit

No. 88-1268
United States of America,
Appellee,
v.
Joseph Lombardo,
Appellant.

No. 88-1269
United States of America,
Appellee,
v.
John Philip Cerone,
Appellant.

No. 88-1270
United States of America,
Appellee,
v.
Angelo La Pietra,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: September 19, 1988
Filed: October 21, 1988

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Joseph Lombardo, John Philip Cerone and Angelo La Pietra appeal a district court[1] order modifying their sentences imposed after convictions for conspiracy and Travel Act violations. For reasons discussed below, we affirm the district court's order.

I. BACKGROUND

Lombardo, Cerone and La Pietra each were convicted of one conspiracy count and seven Travel Act violations. The trial court sentenced Lombardo and La Pietra to consecutive terms of two years imprisonment for each of the eight counts and sentenced Cerone to consecutive terms of four years on the conspiracy count and three and one-half years on each of the remaining seven counts.

On direct appeal, this court affirmed each appellant's conviction but noted that it was troubled by the imposition of a consecutive sentence for each conviction because proof of the conspiracy also served as proof of the Travel Act violations. *United States v. Cerone*, 830 F.2d 938, 946 n.8 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1730 (1988). This court suggested "[t]he district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences." *Id.*

Appellants subsequently moved for sentence modification under Fed. R. Crim. P. 35. The district court modified each appellant's sentence so that the conspiracy sentence would run concurrently with the Travel Act sentences,

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[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

but kept the latter sentences as consecutive. This order reduced Lombardo's and La Pietra's sentences each to fourteen years and Cerone's sentence to twenty-five years.

II. DISCUSSION

Appellants raise multiple contentions in their attack on the sentence modification. In examining these contentions, we must observe that appellate review of sentences falling within statutory boundaries is limited to determining whether a gross abuse of discretion exists. *Castaldi v. United States*, 783 F.2d 119, 123 (8th Cir.), *cert. denied*, 476 U.S. 1172 (1986). Essentially, appellants argue that except to one count relating to Cerone,[2] none of them engaged in any personal conduct that violated the Travel Act. Under the *Pinkerton* instructions that the district court gave in this case, *see Cerone*, 830 F.2d at 943-44, the jury might have found that these substantive convictions stemmed only from appellants' participation in the conspiracy (count one). Thus, under these instructions, appellants' criminal responsibility for Travel Act violations rested solely on the conduct of others under an agency theory, whether or not appellants actually knew of or directed the individuals who engaged in the prohibited conduct. These appellants could not be separately guilty of these substantive counts, absent the convictions for conspiracy of which the Travel Act violations were a part.

These arguments do carry weight but essentially are matters relating to the trial court's sentencing discretion. The trial court merged the convictions in precisely the opposite way, making the conspiracy sentence run concurrently with the separate Travel Act sentences.

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[2] The jury convicted Cerone in count seven of having travelled to Kansas City to meet with co-conspirators to discuss the sale of gambling casinos and a skimming operation. *See Cerone*, 830 F.2d at 944-45 n.6.

However, the jury found each appellant guilty of multiple-count convictions. The appellants have cited to us no constitutional or statutory impediment to the imposition of consecutive sentences on the Travel Act violations. Thus, no abuse of sentencing discretion resting on legal grounds is shown. Moreover, an appellate court cannot substitute its judgment in sentencing matters for that of the district judge, absent an abuse of discretion. *United States v. Hollis*, 718 F.2d 277, 279 (8th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). The sentences here fall below the legal maximums available for these offenses. We cannot say that the sentences imposed under the circumstances presented in this case show any gross abuse of discretion.

The remaining contentions[3] raised in this appeal previously were rejected in the appellants' direct appeal and the reasoning found therein will not be repeated here. *See Cerone*, 830 F.2d at 943-46 (examining double jeopardy and *Pinkerton* liability arguments).

III. CONCLUSION

We affirm the sentences imposed on appellants by the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[TO BE PUBLISHED].

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[3] Cerone's contention that his sentence as modified is vague and confusing has merit. Therefore, we suggest that the district court clarify the modification regarding the extent to which the count three sentence is to be served concurrently with the count one sentence.

APPENDIX B

[Filed February 2, 1988]

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 83-00124-07/08/
	)	09/11/12-CR-W-8
JOSEPH J. AIUPPA,	)	
JOHN PHILLIP CERONE,	)	
JOSEPH LOMBARDO,	)	
ANGELO LA PIETRA, and	)	
MILTON JOHN ROCKMAN,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

The five named defendants have each separately filed motions variously styled to correct, reduce or modify sentence, all pursuant to Fed. R. Crim. P. 35. In pleadings filed after his original motion, defendant Aiuppa, cited some alleged difficulty in securing copies of medical records from the Bureau of Prisons, asks the court to delay acting on his motion until he has had the opportunity to file the records in question. The court is willing to grant Aiuppa's request for a delay in its ruling on his Rule 35 motion.

Aiuppa has also filed a motion to compel production of medical records to which the government has responded, and counsel for Aiuppa has replied to that response. This particular subdispute drama is now being played out by obdurate lawyers and administrators. It should not be necessary for the court to become involved in the resolution of this relatively routine problem of securing medical records and the request for a hearing on this matter which should be simply and quickly resolved is denied. Obviously the records which it is appropriate to produce under the applicable regulation should be produced and this should be done without further order of the court.

One other matter must be disposed of before the court turns to the Rule 35 motions. Defendant Rockman has filed a "Motion to Stay Action on Rule 35 Motion Until Additional Facts Can Be Presented," asking this court not to act on his Rule 35 motion until conclusion of the trial in the Southern District of New York in which Rockman is a defendant. At the time Rockman made this request the New York trial had been in progress for six months. It proceeded apace for another three months after Rockman's filing of this motion and showed some promise of being concluded in January 1988. Unfortunately the disclosure of jury tampering charges caused a mistrial in New York and the prognosis of a prompt conclusion is no longer realistic. This court cannot and will not wait for the retrial of that case to rule on this defendant's Rule 35 motion and therefore the motion to stay will be denied.

Turning, then, to the motion of the four defendants remaining to be considered, that is Cerone, Lombardo, La Pietra and Rockman, the court is not persuaded that there is any compelling reason to make any substantial change in the sentences originally assessed. It is clear that each of the sentences is within the statutory limits and the only question remaining is whether this court was guilty of a gross abuse of discretion in levying the sentences at issue and in ordering that they be served consecutively. *See United States v. Kirk*, 761 F.2d 463, 465 (8th Cir. 1985) (per curiam).

Addressing this question, all of the defendants take considerable comfort in the language from the Eighth Circuit's opinion in this case where the author said "[t]he district court may wish to re-examine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences." *United States v. Cerone*, 830 F.2d 930, 946 n.8 (8th Cir. 1987). The court has closely re-examined its imposition of consecutive sentences but, as noted, finds no justification to make major changes in the sentences originally imposed. There is no support for this result in *Castaldi v. United States*, 783 F.2d 119 (8th Cir. 1986) where the propriety of consecutive sentences was also questioned. Affirming the District Court's denial of a Rule 35 reduction, the court said "[o]ur power to review the severity of a criminal sentence is narrowly limited to those rare cases where the district court has 'manifestly or grossly abused its discretion' such that the severity of the sentence 'shocks the judicial conscience.' " *Id.* at 123.

The question then becomes whether there was a gross abuse of discretion by this court in this regard and the answer is that there was not. The United States Supreme Court addressed this question when it said:

> Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes . . . . Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. . . . Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end. . . . Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.

Iannelli v. United States, 420 U.S. 770, 777-78 (1975) (citations omitted).

However, in deference to the footnoted concern of the Court of Appeals, and in order to dispel the possibility

of any appearance of unfairness, the sentence as to each of the moving defendants will be modified so as to provide that the sentence as to Count One shall run concurrently with the sentence as to Count Two and that the sentences as to Counts Two through Eight shall run consecutively. Otherwise the defendants' motions will be denied. It is therefore

ORDERED that as to defendants Lombardo, Rockman and LaPietra, the sentences previously announced as to each of said defendants are modified to provide that the sentence announced as to Count One shall run concurrently with the sentence announced as to Count Two and that the sentences as to Counts Two through Eight shall run consecutively. It is further

ORDERED that as to defendant Cerone, the sentence announced as to Count One shall run concurrently with the sentence announced as to Count Two and with so much of the sentence announced as to Count Three as is necessary, and that the sentences as to Counts Two through Eight shall run consecutively. It is further

ORDERED that defendant Rockman's motion to stay action on his Rule 35 motion is denied. It is further

ORDERED that in all other respects the motions of defendants Rockman, Cerone, LaPietra and Lombardo to correct, reduce or modify sentence under Fed. R. Crim. P. 35 are denied. It is further

ORDERED that defendant Aiuppa's request for a delay in this court's ruling on his Rule 35 motion is granted, and that his request for a hearing on the production of medical records is denied.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

February 2, 1988